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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 462

UNITED HOISTING CO., INC., AND LOCAL NO. 15C INTERNATIONAL UNION OF OPERATING ENGINEERS, A.F.L., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R.A. 68-75)[1] is reported at 198 F. 2d 465. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B.A. 79a-127a) are reported at 92 NLRB 1642.

[1] "R.A." refers to petitioners' (respondents below) Appendix to which has been added the opinion and decree of the court below; "B.A." refers to the Board's Appendix.

JURISDICTION

The decree of the court below was entered on September 2, 1952 (R.A. 76-83). The petition for writ of certiorari was filed on November 22, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the employment of an attorney by the National Labor Relations Board as a legal assistant to a Board member to aid the member in carrying out his adjudicatory functions precludes assignment of that attorney for a period of training to the staff of the General Counsel to act in the latter's behalf and under his direction in the prosecution of cases before the Board.

2. Whether the National Labor Relations Board is precluded from exercising its adjudicatory function in a case coming before it merely because a legal assistant to one of its members, who had been assigned temporarily to the staff of the General Counsel, participated as one of the counsel in prosecuting the case.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), and of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001, *et seq.*) are set forth in the Appendix, *infra*, pp. 18-21.

STATEMENT

In its decision and order, affirmed and enforced by the court below, the Board found that the Company and the Union, petitioners herein, had engaged in certain unfair labor practices, and, pursuant to such findings, entered appropriate remedial orders (B.A. 93a-94a, 97a-98a; 118a-124a). Inasmuch as the petition for a writ of certiorari calls into question only the propriety of the participation of Melvin J. Welles, as counsel in the prosecution of this case before the Board, the statement herein will be restricted to the facts pertinent to that issue.

Upon complaint issued March 9, 1950 (B.A. 13a), a hearing was held before a trial examiner on April 17, 1950, and from April 27 to May 1, 1950, Melvin J. Welles participated as co-counsel for the General Counsel in the prosecution of the case (B.A. 33a, 82a). The trial examiner issued his intermediate report and recommended order on July 13, 1950 (B.A. 110a) and the Union filed its initial exceptions to the report and order on August 10, 1950. On January 26, 1951, the Board entered its decision and order (B.A. 125a).

After the Union had filed its initial exceptions, an exchange of correspondence took place between the Union's counsel and the Executive Secretary of the Board (R.A. 56a-57a).[2] By letter dated Sep-

[2] This correspondence, set forth in the appendix printed by petitioners, is not part of the record in this case. Petitioners did not avail themselves of Section 10(e) of the Act by which a court is empowered, upon request, to grant leave to adduce additional evidence before the Board if, in the court's opinion,

tember 1, 1950, Union counsel wrote the Executive Secretary that (R. 57a):

> During the past week it has come to my attention that said Melvin J. Welles, Esq., is on the staff of the Board as Law Clerk to one of the members and that he held this position at the time he tried this case on behalf of the General Counsel's office. I would appreciate your advising me if this fact is so, namely, that Mr. Welles, is designated as part of the staff of the National Labor Relations Board at the time he tried this case. If such is the fact, then I desire to obtain leave to file a supplemental Bill of Exceptions to the said Intermediate Report, based upon the improper designations of trial counsel, one who is serving as an attache with the National Labor Relations Board.

On September 5, 1950, in reply, the Executive Secretary wrote that (R. 56a):

> Mr. Melvin J. Welles is employed as legal assistant to one of the Board members and has been so employed since 1947. During the period March 27, 1950 to May 1, 1950, Mr. Welles was detailed to the New York Regional Office of the Board. The purpose of this detail was to acquaint legal assistants to the Board members with field practice and thus render better service to parties coming before the Board be-

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the additional evidence is material and there are reasonable grounds for the failure earlier to adduce it before the Board. However, since this objection to considering the correspondence was not interposed in the court below, it is not urged here.

cause of a fuller knowledge of their problems.[3]

If you desire to file a supplemental Bill of Exceptions based upon Mr. Welles' detail to the New York Office during the hearing in the United Hoisting matter, you may file such Bill of Exceptions by September 18.

On September 11, 1950 the Union filed supplemental exceptions, in which the Company subsequently joined, stating

> The Respondent Union respectfully excepts to the Findings of Fact, Conclusions of Law, and Recommended Order of the Trial Examiner dated July 1950 on the ground that the hearing had before the Trial Examiner was conducted by ALVIN J. WELLES, Esq., who, at the time of said hearing, was a law assistant to one of the Board members and who at the time of said hearing was not legally appointed to the staff of the General Counsel, who alone, is authorized under the Act to prosecute complaints based upon violations of said Act.

The Union cited in support of its exception Section 3 (d) and 4 (a) of the National Labor Relations Act, as amended, and Rules 201.2, 201.3, and 202.10 of the Board's Rules and Regulations.[4]

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[3] N.L.R.B. Bulletin No. 69 (1950), reproduced on page 18 of the Petition, sets forth the purpose and function of the Training Program for Board Legal Assistants.

[4] Rules 201.2 and 201.3 (13 F.R. 3090) describe the function of the General Counsel and the organization and function of the Board's staff. Rule 202.10 (29 CFR 42), now designated 101.10 (13 F.R. 5652), describes conduct of a hearing. The text of these rules is set forth in the Appendix, pp. 20-21.

In its decision issued on January 26, 1951, the Board rejected the Union's contention, explaining that (B.A. 115a, n. 1):

> The Respondents have excepted to the Intermediate Report on the ground that the General Counsel's case was presented by a legal assistant to one of the Board Members. We find no merit in this exception as, at the time of the hearing, the legal assistant had been transferred to the staff of the General Counsel in the Regional Office, and was under the general supervision of the General Counsel, as required by Section 3 (d) of the Act.

On January 9, 1952, the Board amended its decision on the issue by adding the further administrative notation that the legal assistant "at no time thereafter [i.e., after the trial] participated, advised, or assisted in the decision in this case" (B.A. 127a).

The court below, in affirming the Board's findings and enforcing its order, addressed itself, *inter alia*, to the Union's contention that the assignment of a legal assistant to a Board Member to prosecute this case violated the Act. Setting forth the Board's holding, the court said (R.A. 74):

> Clearly there was no violation of the Act by the Board in this incident. During his training period with the General Counsel Mr. Welles had been expressly divorced from his work with the Board. He was completely under the direction of the General Counsel. Neither in fact nor in purpose was there any combination of judicial and prosecuting func-

tions. In a laudable effort to give their assistants a rounded out experience so that they would be able to render better service to parties coming before the Board, the latter body arranged for the sort of detached trial assignment under the General Counsel which Mr. Welles was given in this matter. In so doing the Board functioned with the highest sense of responsibility for its obligations under the Act.

ARGUMENT

1. Section 3 (d) of the National Labor Relations Act, as amended, vests in the General Counsel of the Board exclusive power to investigate and prosecute unfair labor practice cases and commits to the Board itself sole authority to adjudicate them. [5]

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[5] The very cases relied upon by petitioners (Pet. 9-10) to establish their claim that the Board does not "take seriously the mandate of Congress" prescribing the separation of functions establish, so far as relevant at all, quite the contrary. See *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 421 (C.A. 9), certiorari denied, 342 U.S. 815. In *National Electric Products Corp.*, 80 NLRB 995, the trial examiner, Robert N. Denham, had been appointed by the President as General Counsel of the Board prior to the issuance of the intermediate report. The Board held that the appointment as General Counsel vested Mr. Denham with the statutory responsibility for the prosecution of that as well as all other cases before the Board, and that hence he could no longer under the statutory scheme function in the adjudicatory role of trial examiner. *In Pure Oil Company*, 74 NLRB 1382, n. 1, the Board held that a hearing officer in a representation proceeding was not disqualified because he had acted as prosecutor in an earlier unfair labor practice proceeding. The Board there noted that in a representation case, a non-adversary proceeding, the hearing officer does not adjudicate but merely reports the facts for the Board's decision. *H. & H. Manufacturing Company, Inc.*, 87 NLRB 1373, n. 3, in no way involves a commingling of prosecuting and judicial functions and hence is completely inapposite here.

Petitioners make no claim that the Board itself participated in the prosecution of the instant case or that the General Counsel himself participated in its adjudication. Nor is any claim made that a legal assistant acting under the Board's direction participated in the prosecution of a case, or, conversely, that an attorney acting under the General Counsel's direction participated in its decision. The precise contention urged is that an attorney employed as a legal assistant to a Board member is by that very circumstance precluded from assignment to the staff of the General Counsel to work under the latter's supervision in prosecuting cases before the Board, without regard to whether there is a commingling of prosecuting and adjudicating functions in the same, or a factually related, case. We demonstrate below that neither the National Labor Relations Act, as amended, nor Section 5 of the Administrative Procedure Act contemplates or requires such a futile dichotomy. Accordingly, we respectfully submit that in rejecting petitioner's contention the Board and the court below were clearly correct, and that no substantial question warranting review by this Court is presented.

A. In further delineating the scope of authority of the General Counsel *vis-a-vis* the Board, Congress provided in Section 3 (d) of the Act that the "General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers

and employees of the regional offices." Section 4 (a) provides for the employment of attorneys as legal assistants to Board members to aid the latter in carrying out their function of adjudication. Supervision of legal assistants, while they are acting as such, is, of course, vested in the respective Board members.

Against this statutory framework defining the separation of prosecuting and adjudicatory functions, the status of Melvin J. Welles is indisputably established by the record. Thus, as stated in the letter of the Board's Executive Secretary to the Union's counsel (*supra*, pp. 4-5), Welles, who was "employed as a legal assistant to one of the Board members," was assigned for about a month to the New York Regional Office as part of a program "to acquaint legal assistants to Board members with field practice and thus render better service to parties coming before the Board because of a fuller knowledge of their problems." And as stated in the Board's decision (*supra*, p. 6), "at the time of the hearing the legal assistant [Welles] had been transferred to the staff of the General Counsel in the Regional Office and was under the general supervision of the General Counsel, as required by Section 3 (d) of the Act." It is plain, therefore, as the court below found (R.A. 74) that "During his training period with the General Counsel, Mr. Welles had been expressly divorced from his work with the Board. He was completely under the direction of the General Counsel." Under these circumstances, it cannot be properly contended that Welles' par-

ticipation in the prosecution of the instant case violated Section 3 (d) of the Act.[6]

(b) Petitioners raise, by question and specification of error (Pet. pp. 2, 7), although they do not discuss the point, the issue of whether the Board could properly, by amendment of its original decision, make findings as to Welles' status "without adducing additional evidence upon which it bases its findings." The issue thus raised is without substance. The statements made by the Board concerning the status of Welles and the extent of his participation in the instant case were matters of which the Board could properly take "official notice." See *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 529-530. Petitioners did not contend that Welles took any part in the adjudication of the case, and it is plain that petitioners were not prejudiced by the action of the Board in noticing officially a fact peculiarly within its own knowledge, *viz.*, that

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[6] On page 7 of the petition, petitioners suggest that nothing in Bulletin 69 (Set forth in Petitioners' Appendix B, Pet., p. 14) authorized the assignment of legal assistants to the staff of the General Counsel "for the prosecution of trials." This suggestion merely points to a factual issue as to what the Board and the General Counsel had agreed upon in connection with the Training Program for Board Legal Assistants. Obviously, the Board and the General Counsel interpreted their own agreement to permit legal assistants assigned to the staff of the General Counsel to participate in the trial of cases. This is implicit in the finding of the Board that the legal assistant involved in this case was under the general supervision of the General Counsel (B.A. 115a, n., 12a, n.) and in the finding of the court below that the legal assistant was completely divorced from his work with the Board and was completely under the direction of the General Counsel (R.A. 74). It is plain, therefore, that this issue presents no question of law warranting review by this Court.

Welles at no time participated, advised, or assisted in its own decision in this case.

In any event, in the face of the express statutory mandate to the contrary, it is beyond reasonable question that the Board would retain supervision over the work of the legal assistant in the regional office during the period that he was detached from service with the Board, or that the General Counsel would consent to any such arrangement. Where the statutory requirement is clear, where the Board states that the requirement has been observed and nothing to the contrary is indicated, there is no showing made which puts the Board to proof. *National Labor Relations Board* v. *Greensboro Coca Cola Co.*, 180 F. 2d 840, 844-845 (C.A. 4). The presumption of administrative regularity (*ibid.*, and cases there cited; and see *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 229-231; *United States* v. *Morgan*, 313 U.S. 409, 420-422) is not rebutted by mere innuendoes. "Nebulous and declamatory assertions, wholly unspecified, must not stand in the path of an effective discharge of the Board's duties * * *." *Fay* v. *Donds*, 172 F. 2d 720, 725 (C.A. 2). As well could the Board be put to proof of decisional statements that it had reviewed the whole record, or that it had considered exceptions and briefs, or that it had observed the numerous other proprieties touching upon the adjudication of a case before it. The danger to the administrative process of adopting a rule that would require the board to prove by evidence its own regularity of action in every case

should not be lightly cast aside, for, as the Third Circuit long ago observed in *National Labor Relations Board* v. *Botany Worsted Mills, Inc.*, 106 F. 2d 263, 267, "since the litigants before the Labor Board are legion, the evil of harassment * * * is correspondingly multiplied. The function of deciding controversies might soon be overwhelmed by the duty of answering questions about them."

(c). Petitioners' reliance (Pet., pp. 7, 9) on Section 5(c) of the Administrative Procedure Act, *infra*, p. 19, is misplaced. The Board's action in temporarily detaching Welles for service with the Regional Office where he was assigned to prosecute the instant case was plainly not at variance with that Act. Section 5(c) specifically provides that "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, *in that or a factually related case*, participate or advise in the decision * * *" [Italics supplied]. Embodying a policy judicially endorsed prior to its enactment (*National Labor Relations Board* v. *Botany Worsted Mills, Inc., supra*, at 266), that section prohibits an individual who has engaged in the investigation or prosecution "in any case" from participating or advising in the decision "in that or a factually related case." By its terms, therefore, the prohibition is confined entirely to the participation in the decisional process of a case, or one factually related to it, by an individual who has acted in an investigative or prosecutory capacity therein. It contains no prohibition against an individual's

acting in a prosecutory capacity for a given period and in an adjudicatory capacity for a different period, so long as the individual does not perform both functions in the same or a factually related case.

The legislative history of Section 5(c) of the Administrative Procedure Act supports the above interpretation of that Section. As initially proposed in Section 5(c) of H. R. 1203, 79th Cong., 1st sess. (S. Doc. No. 248, 79th Cong., 2d sess., 157), this section could have been read as a complete separation of investigative and prosecutory personnel from adjudicatory personnel, for it originally provided that: "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency shall participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings." This absence of explicit confinement of the prohibition to the same or a factually related case was modified by a later version of the section which limited its ban to participating in the decision of the same "or a related case" (S. 7 (revised), 79th Cong., 1st Sess., Sec. 5 (c), in S. Doc. No. 248, 79th Cong., 2d Sess., 24). As finally enacted, the limitation to a "related" case was further modified to confine it to a "factually related" case. Accordingly, the progressive restriction of Section 5 (c) during its legislative evolution makes plain that the "limitation of the prohibition against consultation to those who performed investigative or prosecuting functions 'in that or a factually related case,' should be con-

strued literally." See Attorney General's Manual on the Administrative Procedure Act, p. 54, n. 6 (1947).

Thus, it is clear that an individual who participates in the investigation or prosecution of a case is unavailable to the agency only in the decisional process "in that or a factually related case." Attorney General's Manual on the Administrative Procedure Act, pp. 54-58 (1947). By this means, Congress has assured against the undesirable consequences of permitting one person to perform inconsistent functions in connection with the solution of the same or a related set of facts. At the same time, it has preserved to the pertinent agency the maximum flexibility in utilizing its personnel by permitting the same person to act in an investigative, prosecutory, or adjudicatory, capacity, as it may suit the needs of the agency, so long as the adjudicatory function is not performed by the person who performed either of the other two functions in the same or a factually related case. In short, the statutory separation of duties is on a case-to-case (or case-to-factually related case) basis.

All that happened in this case was that the Board availed itself of the flexibility in the use of personnel, which Section 5 (*c*) of the Administrative Procedure Act permits, to inaugurate for its legal assistants a training program which the court below characterized as "laudable" and as "evincing the highest sense of responsibility for its obligations under the Act" (R. 74). As already noted, the propriety of this action would not be open to ques-

tion even without the Board's assurance that Welles "at no time thereafter [i.e., after the trial] participated or advised in the decision in this case" (*supra*, p. 6). In Section 101.12 of its Statements of Procedure (29 CFR, p. 43), the Board has stated its uniform practice to be that it "does not consult with members of the trial examining staff or with any agent of the General Counsel in the deliberations." Pursuant to its own practice the Board did not in its decisional process in the instant case, consult with Welles who was with respect to that case an agent of the General Counsel (see p. 6, *supra*). Indeed, petitioners have never asserted otherwise. Accordingly, Welles' assignment to prosecute this case was in full compliance with Section 5 (c) of the Administrative Procedure Act, and it involved no violation of the National Labor Relations Act, as amended.

2. Petitioners allege no conflict of decisions on this issue in the courts of appeals, but urge that the court below has itself taken contrary positions on the question. To establish this contrariety, petitioners cite *National Labor Relations Board* v. *Kanmak Mills, Inc.*, C. A. 3, No. 10555, order dated October 26, 1951 (unreported). In that case, unlike the instant case, a motion was made to remand the case to the Board for further findings as to the status of a legal assistant who had been assigned to the staff of General Counsel and who had participated in the prosecution of a case before the Board, and allegations were made that the legal assistant had also participated in the decisional phase of the case. Despite the Board's claim that an

analytical scrutiny of movant's allegations did not raise a triable issue, the court below granted the motion and directed a remand. No opinion accompanied the court's order, but inasmuch as the panel in *Kanmak* was identical with the panel which decided the instant case, it is only fair to assume that the court was of the view that in *Kanmak*, contrary to the Board's claim, an undecided issue of fact was raised by the movant's allegations that the legal assistant had commingled prosecutory and adjudicatory functions. In the instant case such a remand would have been completely inappropriate. No claim was here made that Welles participated in the adjudicatory function in this case, and no motion was made to adduce any evidence on that issue before the Board. In no real sense can the court therefore be regarded as having taken contrary positions in the cases under discussion. Moreover, the very terms of the court's order in *Kanmak*, remanding the case "for the purpose of taking testimony and determining whether [the legal assistant in that case] participated or advised both in functions of investigation or prosecution and in functions of decision in this case contrary to the prohibition of Section 5(c) of the Administrative Procedure Act" constitute an endorsement of the view that interchange of prosecuting and adjudicatory functions by the same employee is permissible so long as no transfer occurs in the same or a factually related case.[7]

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[7] After the foregone was written, the court below handed down its decision on the merits of the *Kanmak* case. In its opinion, dated December 17, 1952, the court, as in the instant case, reaffirmed the view here expressed (slip op., pp. 5-6).

CONCLUSION

The decision of the court below is clearly correct, there are no conflicts of decision, and further review is not warranted. It is respectfully submitted therefore that the petition for a writ of certiorari should be denied.

WALTER J. CUMMINGS, JR.,
Solicitor General.

JOHN R. BENNEY,
Attorney.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

DECEMBER, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Sec. 151, *et seq.*), are as follows:

SEC. 3. (d). There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

SEC. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of $12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney

employed for assignm a legal assistant
to any Board memb for such Board
member review such ripts and prepare
such drafts. No trial ner's report shall
be reviewed, either be after its publica-
tion, by any person han a member of
the Board or his lega tant, and no trial
examiner shall advise sult with the Board
with respect to exce taken to his find-
ings, rulings, or recom tions. The Board
may establish or utiliz regional, local, or
other agencies, and ut uch voluntary and
uncompensated servic may from time to
time be needed. Att s appointed under
this section may, at th tion of the Board,
appear for and repre the Board in any
case in court. Nothi this Act shall be
construed to authorize oard to appoint in-
dividuals for the pur of conciliation or
mediation, or for econ analysis.

The relevant provision he Administrative Procedure Act (60 Stat 7, 5 U.S.C. 1001, *et seq.*), is as follows:

SEC. 5. (c) * * * N ficer, employee, or agent engaged in the brmance of investigative or prosecuting f ions for any agency in any case shall, in tha a factually related case, participate or adv in the decision, recommended decision, or ncy review pursuant to section 8 except as wi ss or counsel in public proceedings. This s ction shall not * * * be applicable in any m er to the agency or any member or member f the body comprising the agency.

The relevant portions of the Rules and Regulations of the National Labor Relations Board (13 Fed. Reg. 3090) are as follows:

SEC. 201.2 *The General Counsel.*—(a) The General Counsel of the Board derives specific authority for his functions from the provisions of the Labor-Management Relations Act, 1947. In addition, he derives certain other authority by delegation from the Board (13 F. R. 654). Under the act, the General Counsel is charged with the functions of exercising general supervision over attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He has also final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board.

SEC. 201.3 (c) *Legal assistants.* Each of the five Board members has a small staff of attorneys, under the general direction of a Chief Legal Assistant, to assist him in reviewing transcripts of hearings and preparing drafts of opinions.

SEC. 101.10 [29 CFR, p. 42] *Hearings.*—(a) Except in extraordinary situations the hearing is open to the public and usually conducted in the region where the charge originated. A duly designated trial examiner presides over the hearing. * The Government's case is con-

* Before it was amended on March 1, 1951, this sentence read, as follows: "A trial examiner, designated by the Chief Trial Examiner and sent from the Washington staff, presides over the hearing." See 16 Fed. Reg. 1935.

ducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint. * * *

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